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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JAGGARS-CHILES-STOVALL, INC.,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that the employer violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to divulge confidential earnings information to the Union when alternative sources of information were reasonably available to the Union and dispositive of issues raised by the Union.

PARTIES

1. National Labor Relations Board
2. Jaggars-Chiles-Stovall, Inc. There are no parent companies, affiliates or subsidiaries of Jaggars-Chiles-Stovall, Inc.
3. Dallas Typographical Union No. 173

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Jaggars-Chiles-Stovall, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A-25) is reported at 639 F.2d 1344. The decision and order of the National Labor Relations Board (App. A-21) are reported at 249 NLRB No. 108.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1981 (App. A-32). Mandate was stayed to and including May 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer —
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

STATEMENT

1. Jaggars-Chiles-Stovall, Inc. (hereinafter "the Company") is an employer engaged in the printing business in Dallas, Texas (App. A-5). For many years, the Company has had a harmonious collective bargaining relationship with Dallas Typographical Union No. 173 (hereinafter "the Union"), which represents the Company's printing employees. The most recent agreement between the Company and the Union is effective from February 21, 1977 to June 30, 1981 (App. A-5).[1]

2. Seven or eight years ago, when all of its employees were members of the Union, the Company began submitting employees' monthly earnings reports to the Union; the reports enabled the Union to compute members' dues (App. A-6). Subsequently, as employees dropped out of the Union, they told the Company that they did not wish to have their earnings reported to the Union (App. A-10). At the express request of certain employees, the Company, for several years, did not supply the Union with specific earnings data on those non-Union member employees although it continued supplying the information relating to all Union members (App. A-10).

3. After several years, the Union sought to have the Company change precedent by requesting a monthly report of the gross earnings of some supervisory and all bargaining unit personnel (App. A-7). This information was purportedly necessary to enable the Union to police the overtime provisions of the bargaining agreement, although the Union had not received complaints about overtime from any employees (App. A-7). According to the Union, the investigation of the overtime issue could have been made if the Union had knowledge of the overtime hours worked by each employee (App. A-8). The Union admitted that the Company never refused to turn over this alternative form of information to the Union (App. A-8).

[1]The agreement applies to a unit of all journeymen and apprentices involved with the markup of copy continuing on through the printing press (App. A-5).

4. In February, 1979, the Union's chapel chairman,[2] William Bates, told Company President Robert Stovall to provide him with a list of the gross earnings of all bargaining unit employees (App. A-7). As the explanation for needing the information, Bates only told Stovall that it was necessary "to police the contract" (App. A-7). Because his non-Union employees had instructed him not to divulge this information, Stovall advised Bates that he would be unable to do so for that reason (App. A-10). Nonetheless, as in the past, Stovall agreed to submit gross earnings information on employees who were Union members (App. A-10). Bates repeated his request in March, 1979, and Stovall, repeating the employees' instructions against disclosure, again was unable to provide the Union with information in the precise form desired by the Union. On both occasions, Bates did not ask for the information in another form although he knew the Company was not unwilling to provide it in the other form (i.e., the amount of overtime worked by each employee) (App. A-8).

5. Upon charges filed by the Union, the Board summarily affirmed the decision of its Administrative Law Judge, thereby concluding that the Company's refusal to divulge the requested wage data regarding both supervisory and non-Union personnel violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. §158(a)(1)(5). The Board concluded, *inter alia,* that the Company had a legal duty to furnish the data "even though the Union may not have advised [the Company] of the reasons for requesting the earnings information until the hearing . . ." (App. A-15). The Board rejected the Company's defense of confidentiality, and concluded that the principles enunciated by this Court in *Detroit Edison Company v. N.L.R.B.,* 440 U.S. 301(1979) were inappli- cable (App. A-15; citation omitted):

> "True, the Supreme Court in that case stated that a Union's bare assertion of a need for data does not

[2]A chapel chairman is the equivalent of a shop steward (App. A-6).

> oblige the employer 'to supply all information.' But the information sought in that case – aptitude test questions, answer sheets and scores – was far more sensitive than the wage information sought here, and Detroit Edison had made an adequate alternative means of granting the union's [sic] request for the information sought."

The Board ordered the Company to furnish the Union with the names and rates of pay of each unit employee, including those classified as foreman and assistant foreman, and all other information relevant and reasonably necessary to the performance of the Union's obligation as a bargaining representative (App. A-18).

6. The court of appeals granted enforcement of the Board's order. The court held that the Company could not withhold non-Union unit employee wage data from the Union even though certain non-Union unit employees specifically had requested that the data be kept confidential. Referring to previous decisions by the Fifth Circuit[3] and other circuit courts,[4] the court rejected the argument that under some circumstances the wage data of unit employees should be treated confidentially (App. A-29). The court distinguished this Court's *Detroit Edison* decision, stating (App. A-29):

> "Wage data concerning each employee, here involved, is not akin to the sensitive individualized test-result information, as to which a defense of confidentiality was recognized in *Detroit Edison Co.;* nor did that decision cast doubt upon the previously-cited consistent jurisprudence rejecting any claim of confidentiality, where relevant wage data was sought by the bargaining unit's representative."

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[3] *N.L.R.B. v. Item Co.*, 220 F.2d 956 (5th Cir. 1955).

[4] *N.L.R.B. v. Frontier Homes Corp.*, 371 F.2d 974 (8th Cir. 1967); *Utica Observer-Dispatch, Inc. v. N.L.R.B.*, 229 F.2d 575 (2d Cir. 1956); *Boston Herald-Traveler Corp. v. N.L.R.B.*, 223 F.2d 58 (1st Cir. 1955).

The court also held that the Company was not entitled to withhold the requested wage data on foremen or assistant foremen. The Court found that the bargaining agreement allowed them to do unit work and, although the Union admitted that alternative information sources regarding the overtime of foremen – i.e., amount of overtime worked – were sufficient to enable the Union to perform its representational function, that the requested wage data was relevant and should have been disclosed by the Company (App. A-31).

REASONS FOR GRANTING THE WRIT

This case, involving an important issue of federal labor law, focuses on the balance to be drawn between an employer's duty to honor employees' requests not to divulge confidential wage data, and the Union's right to the information when alternative, reasonably available, non-confidential forms of related information would enable it to perform its representational function. The court of appeals enforced the Board's order which found that the Company's refusal to submit wage information in its confidential form violated Section 8(a)(1) and (5) of the Act. A conflict in principle exists between the rule followed by the Fifth Circuit and this Court's recent decision in *Detroit Edison Company v. N.L.R.B., supra,* 440 U.S. at 301. This Court should grant a writ of certiorari to resolve this conflict.

In *Detroit Edison,* this Court stated that

> "A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the *manner requested.* The duty to supply the information under §8(a)(5) turns upon 'the circumstances of the particular case,' . . . and much the same may be said for the type of disclosure that will satisfy that duty . . ."

440 U.S. at 314-315 (citations omitted; emphasis added). This Court expressly refused to rule that "union interests in arguably relevant information must always predominate over all other interests, however legitimate." *Id.* at 318. Accordingly, this Court therein enunciated the principle that an employer satisfies its statutory obligations under Section §8(a)(5) when it refuses to divulge confidential information to the bargaining representative of its employees where alternative, non-confidential sources of related information exist.

The ruling of the court of appeals ignores the principles which this Court enunciated in *Detroit Edison* – specifically, the court of appeals has established the absolute rule that an employer violates Section 8(a)(5) whenever it refuses to supply wage data in the *precise form* demanded by a union, although (1) non-union employees expressly request non-disclosure, (2) other forms of pertinent related information are readily available to the union for the asking, and (3) there is no evidence whatsoever that the employer's refusal is intended to frustrate the union's attempts to police the contract. The ruling of the court of appeals, which also ignores the rulings of other federal appellate courts,[5] establishes as the law of the Fifth Circuit that union interests in arguably relevant wage information must *always* predominate over all other interests no matter how legitimate they are. This Court and the other courts which have considered the confidentiality issue have found that confidentiality often is warranted and that absolute rules such as the Fifth Circuit's will not be countenanced as a matter of federal labor law.

This Court should therefore take this opportunity to correct the conflict resulting from the court of appeals' refusal to apply the principles of *Detroit Edison* to this case.

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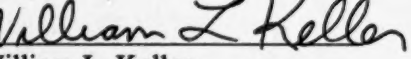
[5] *See* cases cited in *Detroit Edison Co., supra,* 440 U.S. at 318, n. 14.

Conclusion

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

A-1

(Official Report of Proceedings Before The NLRB, Pages 47, 53, & 55)

[47]

request referred to this earnings report –

A Yes, sir, it did.

Q – in the context of names of people that you wanted this information on?

A It did, sir.

Q And you say that you indicated to him why you wanted this information? Why was there a departure from your past practice?

A I asked him – the only explanation was to police the contract. I didn't give him any other reason.

Q Didn't get into any details?

A No, sir.

Q Now, as I understand it your areas of concern, if you will, for which you felt that you needed this information were, number one, that some individuals had been working weekends and you weren't sure whether or not they had been paid, is that correct? Is that one area of concern?

A This is one of the areas.

A Are you aware of any situation at the company where an employee worked overtime and was not paid for it?

A I'm not aware of whether they were or not, except those union personnel.

Q Did you – now, what do you mean when you say except union personnel? Are you aware of any union personnel that worked overtime and was not paid for it?

[53]

of overtime, how is it that you need dollars and cents figures as opposed to simply knowing how much overtime each individual worked?

A In reference to the question of overtime the hours would be sufficient.

Q And has the company not offered to give you that overtime information?

A The contract stipulates that they will.

Q OK.

Have you asked for it in that form?

A Through the contract we have.

Q I mean, have you specifically asked for the number of overtime hours worked by these individuals on your earnings report list?

A No, sir, I didn't specify that one particular thing. That would be only part of the information we need.

Q Has the company expressed a willingness to give that information to you?

A Through signing the contract, yes, sir.

Q Have they also not specifically offered to give you that information in a specific offer recently in response to these?

MR. WILLIS: Objection, Your Honor. I think it's traditional that we do not get into prehearing settlement negotiations as part of the evidence adduced at trial,

[55]

A I don't remember recalling it, sir.

Q And in fact the company has never expressed an unwillingness to give you that information, have they?

A They have never told me that they wouldn't, no, sir.

Q OK.

I believe in reference to your concern over the area that people were not being paid appropriately for overtime,

you said you had reason to believe that they were not being paid properly. On what do you base that belief?

A The secrecy of what non-union employees received is one indication.

Q I'm not sure I follow that.

A I have no knowledge of what non-union personnel are receiving, whether its contractual or not other than the fact that there is a reference of days and nights written on the –

Q Other than the fact that you do not know what their specific has been, has there been any complaints or circumstance that have indicated that any individual, union member or not, has not been paid overtime according to the contract?

A I've received no grievance.

Q Is there any circumstance that leads you to believe that they were not being paid it?

A The lack of knowledge and the secrecy and the refusal

JD-(SF)-18-80
Dallas, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

JAGGARS-CHILES-STOVALL, INC.
and Case No. 16-CA-8323[1]
DALLAS TYPOGRAPHICAL UNION NO. 173

Doyle H. Willis, Jr., Esq., of Dallas, Tex., for the General Counsel.
Phillip R. Jones, Esq., of Dallas, Tex., for Respondent.

DECISION

HAROLD A. KENNEDY, Administrative Law Judge: This case is before me upon a complaint issued by the Regional Director of Region 16 of the National Labor Relations Board on March 23, 1979, alleging violation of Section 8(a)(5) and (1) of the National Labor Relations Act. The complaint, based on a charge filed by the Dallas Typographical Union No. 173 filed on February 9, 1979, [2] alleges that Jaggars-Chiles-Stovall, Inc. (JCS) violated the Act by refusing to supply wage rate data for all employees in a bargaining unit at its printing press facility in Dallas, Texas. I find that the Charging Party Union is entitled to such earnings information and, accordingly, recommend entry of an appropriate cease and desist order.

[1] The caption of the case was amended at the hearing so as to show the correct designation of the Respondent Company's name and the full name of the Charging Party Union.

[2] An amended charge was filed on July 9, 1979.

Background – Undisputed Matters

Respondent's answer and stipulations reached at the hearing eliminated many issues. Jurisdiction is not in question. Much of the testimony was not contradicted.

JCS is engaged in the printing business with its office and place of business located at 5531 East University Boulevard in Dallas, Texas.[3] Respondent admits that it grosses over $500,000 annually and that it purchases goods and/or services from out of state valued in excess of $50,000. Based on these facts and Respondent's answer, I find Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act. Labor relations between Respondent and the Union have been harmonious over the years. The Union has been the recognized collective bargaining representative of Respondent's printing employees for many years. Respondent agrees that the following employees, described in paragraph 6 of the complaint, constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All journeymen and apprentices involved with the markup of copy continuing on through the printing press, excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run, at the Respondent's Dallas, Texas facility . . .

In 1978 the Union and Respondent signed a collective bargaining agreement covering the period of February 21,

[3] Robert Stovall, president of Respondent, described its business as follows:

> Well, we're in the graphic arts business and basically we're typographers. And we also have a printing department. And typography is a process through which we convert typed matter into pages for books or advertisements or magazines, grocery store ads.

1977, to June 30, 1981. The agreement was received in evidence as General Counsel's Exhibit 2.

The Union requested Respondent to supply wage rates for all employees in the bargaining unit, but Respondent has refused to do so except for those who are members of the Union.[4]

The Testimony

William Bates, Chapel Chairman at JCS,[5] testified that over the years the Company had supplied monthly "earnings reports" to the Union. The reports contain the names of foremen and all members of the bargaining unit, including assistant foremen. The practice of the Company has been to furnish wage information only on those who are members of the Union. With respect to nonunion members, the Company has disclosed, as indicated on General Counsel's Exhibit 3, the earnings report for January 1979, only whether such employees had worked either on day or night shifts.[6]

Bates testified that he used the earnings reports in policing the contract, in preparing for future negotiations and in assessing dues of the members of the union. On cross-examination he agreed that the list had been used in making deductions for union dues. At one time he said every member doing bargaining unit work for JCS was a member of the Union. He agreed that the Company furnished wage information on every employee while a member of the Union.

---

[4] The Union requested earnings information on at least one employee, Calvin Wilson, who is no longer a member of the bargaining unit.

[5] Bates explained that chapel chairman is the equivalent of shop steward. He said he had worked for Respondent since 1967 and had been on the negotiating committee that negotiated the current collective bargaining agreement. Bates currently does "cold type makeup" but had previously done "hot metal makeup" for JCS.

[6] The reports are supplied each month and report the amount of wages of union members on a weekly basis. Some reports cover a four-week period, and some cover a five-week period.

Bates explained that the procedure for obtaining the wage information was as follows: The Union would send to him, the chapel chairman, a form containing the list of names of employees performing unit work. He would take the form to the Company's bookkeeping department where George Clower would fill out the wage and shift information. Thereafter the completed form would be returned to Bates, and he would then forward it on to the Union.

Bates testified that around February 1 or 2 of 1979,[7] he asked Bob Stovall, president of JCS, to supply wage information on nonunion employees for the month of January. Bates said Stovall's response was that he would be willing to submit earnings information only in the form that the Company had previously. Bates said he told Stovall that he needed the additional information in order "to police the contract."[8] Bates said he thereafter spoke to Union President Ken Cowen and asked that he (Cowen) try to secure the nonunion wage information from Stovall.

In March Bates spoke to Stovall again at which time he said Stovall reported that the Company had been notified by the NLRB that the Union had filed charges against it. Bates said that he again explained to Stovall that the Union needed the nonunion wage information but that Stovall only "reiterated his statement that he would be willing to continue to furnish the report with days and nights by nonunion personnel and the amounts for union personnel."

Bates indicated that he decided to press for the nonunion wage information in early 1979 because he knew there were employees who worked on Saturdays and Sundays.[9] Bates

[7] All dates refer to 1979 unless otherwise indicated.

[8] Bates said he had asked for wage information on nonunion employees two years previously without success.

[9] According to Bates, Doy Black and his son, James Black, were working on the weekend at the time. Bates said that James Black had told him that Doy Black was doing "personal work" for the Company at the time. He said no grievance had been filed on the issue, but that "the secrecy and the refusal of answers" aroused suspicion.

said he did not know if they were paid overtime or if at all. He said he was concerned about payment of overtime and that overtime work should be "given out in a fair and equitable manner" in accord with the contract. Bates also stated that he had become concerned about the possibility that an assistant foreman, who could do journeyman work on an hourly basis subject to regulations applicable to journeymen (Article II, Section 6 of General Counsel's Exhibit 3), might be working "in excess."

Bates had initially indicated a concern about the wages of foreman who are paid straight salary but "may perform production work to expedite the production schedule."[10] He indicated on cross-examination, however, that being advised of the amount of overtime they worked, without regard to the amount of earning, could be sufficient.[11] Bates insisted that knowing the earnings paid to assistant foremen was essential, however. Said Bates:

> . . . Assistant foremen are paid a percentage above journeymen wages. If he works overtime he's paid overtime on the basis of his pay, not journeyman scale, therefore, he would draw overtime on a – time and a half on his regular hourly wages. To know that he was being paid properly it would be necessary to know the amount. To know that the overtime was being distributed equitably we would need to know the number of hours. To compile as to whether the overtime pay and hours did correspond we would need to know them both.

[10] The contract (Section 6 of Article II) also states that foremen "will not perform such work to reduce overtime or to maintain a smaller work force than otherwise would be required." Respondent and the Union, however, obviously do not agree on the interpretation of this language. See pages 50, 60-62, 66 of the transcript. Bates claimed that Havis "Tony" Harris had been performing "nearly full-time on [the] keyboard" and was thereby "depriving someone of a job."

[11] Bates indicated that the Company was required under Section 12 of Section VI of the contract to supply the number of hours worked at each location (chapel) and that the Company had not refused to do that because he did not recall ever asking for it.

Bates orginally testified that there were approximately 75 persons in the bargaining unit but on rebuttal revised the size of the unit to be from 54 to 60. He identified the position of several persons (most of whom were on the January earnings report in evidence, General Counsel's Exhibit 3) as follows: Paul Anthes, assistant foreman; Robert Gibbs, assistant foreman; Keith Heckethorn, assistant foreman; David Shindoll, assistant foreman; Frank Joy, assistant foreman; Robert Walker, lead (and head) machinist; Danny Bridwell, pressman; and Eugene Vessells, journeyman printer. Bates said there were two men on the earnings report who he recognized as being foremen and working on straight salaries. His testimony indicated that the foremen he had in mind were Henry "Derwood" Combs and Havis "Tony" Harris. He also indicated that Gibbs and Shindoll may also be foremen, but that he did not have the necessary information.[12]

Kenneth Cowen, the president of Local 173, testified that he participated in the negotiation of the current collective bargaining agreement signed by the Union and JCS. He said that eight employers were signatory to the agreement and that, therefore, his Union had authority over 8 "chapels." Cowen said he had indicated to Stovall around August or September 1978, when the agreement was signed, that there were "possible contract violations" but that they were not pursued for "lack of information." He claimed that the Union needed the additional earnings information to "adequately police the contract" and "for other purposes,"

[12] The parties stipulated that Frank Joy, Paul Anthes, Robert Dendy, Keith Heckethorn and Ed Cabeen were all assistant foremen. They also stipulated that Durwood Combs was a foreman, but the General Counsel's attorney denied having sufficient information to stipulate that Shindoll, Harris and Gibbs were also foremen or that Eugene Vessels was an assistant foreman.

The January earnings report lists persons who are no longer in the bargaining unit (e.g., Calvin Wilson, maintenance superintendent). Bates indicated that he had simply asked Stovall for earnings report on all those persons listed on the earnings report form.

including "the amount of time worked by assistant foremen and foremen and the loss of jobs that might result from this, and so forth." Initially, Cowen indicated that the other 7 employers who signed the contract had furnished the Union with sufficient earnings information, but he later modified his testimony. He said the Union got earnings information of all unit employees from 4 employers (The Dallas Times Herald, the Wall Street Journal [all union members,] Powell Printing [all union members] and Reilly Printing [all union members,] but he ultimately conceded that he was not sure about receiving the earnings information on nonunion employees at the Dallas Morning News, the Typography Plus or at Galaxie Printing.

Robert Stovall, President of JCS, appeared as a defense witness. He agreed that he had been asked by Chapel Chairman Bates on two occasions in early 1979 to furnish additional earnings information on JCS employees. Stovall said in each case he told Bates he would be willing to give the same wage information as he had in the past. Stovall denied that Bates had said anything about needing the information for either policing the contract or for handling of grievances.

Stovall said he declined to furnish any additional earnings information on the basis that (nonunion) employees considered their earnings to be "privileged information." Stovall explained that 7 or 8 years ago the Company had begun supplying earnings reports to the Union "when everyone belonged" because it had said it "needed this information in order to compute the dues." Later on, he said, some of the employees who dropped out of the Union requested the Company not to report their earnings to the Union. He recalled that Robert Gibbs, Calvin Wilson, Doy Black, Tony Harris were among those who made such a request. According to Stovall, there was an "understanding" among employees (expressed, he said, by L.C. Boyd, Robert Walker, Derwood Combs and Walter Rosenboom) that wage information on nonunion employees would not be reported to the Union.

Stovall also undertook to explain the authority and responsibility of certain JCS employees and officials. He identified Robert Gibbs (photo composition), David Shindoll (camera department) and Henry Combs (hot metal department) as salaried foremen and Tony Harris as department head (photo typesetting and camera) who supervised such foremen.[13] He gave some detailed information on the authority of Harris, who fires, disciplines, directs and evaluates work of employees, and Assistant Foremen Frank Joy (photo composition–night), Paul Anthes (directs "floor work"–night), Robert Dendy (lead man on keyboard), Keith Heckethorn (camera–night), Eugene Vessells (darkroom–days) and Ed Cabeen (linotype department–days).

A number of Respondent's employees testified that they had requested the Company not to disclose their earnings to the Union, including the following: Robert Gibbs, Donald Cowdrey, Doy Black, Calvin Wilson,[14] Tony Harris,

[13] I have no doubt that Harris and Assistant Foreman Doy Black are supervisors under the Act. Black testified that he is salaried and in charge of customer service and overall plant production. I make no findings on the supervisory status of other assistant foremen – hourly paid employees (but working at different rates) who fill out time records when performing production work, discipline employees for "poor work" and misconduct on the job, attend management meetings, direct work of others and effectively recommend discharges – because it is not necessary to make such determination in the case. The Union is entitled to earnings information on all employees, including supervisors, who perform unit work. Stovall said no two assistant foremen have the same authority as they work "in different areas of our operation." Joy does "very little" rank and file work, but all foremen and assistant foremen do some of it, he said. He asserted that the "supervisory responsibilities" of all assistant foremen were much the same except that Dendy, who has a "special training function," does not have "quite as much."

Shindoll and Gibbs classified themselves as assistant foremen when testifying.

[14] Plant Engineer Wilson has not been a recent member of the bargaining unit, but his name was on the list of those whose earnings was requested by the Union.

David Shindoll, Henry Combs and L.C. Boyd. Nearly all of such witnesses had been members of the Union at one time but had dropped out.[15] Harris testified that it was generally known that the wage information of nonunion employees was not being disclosed to others.

Chapel Chairman Bates resumed the stand on rebuttal and testified that he had recently asked 34 of Respondent's employees, including Witnesses Shindoll, Boyd, Combs and Gibbs, whether they had previously requested the Company not to divulge their earnings to anyone. He said he received a negative response from all except Gibbs who, he said, initially had stated that he did not recall asking the company not to reveal such information. It was stipulated that all 34 employees polled by Bates were in the bargaining unit except for Shindoll, Gibbs, Heckethorn and Mapes.

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[15] Cowdrey did not indicate that he had ever been a member of the Union.

Discussion and Conclusions

The Board recently stated in *Westinghouse Electric Corp.*, 239 NLRB No. 19 (1978) that:

It is well established that a labor organization, obligated to represent employees in a bargaining unit with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation.[6] The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of administering a collective-bargaining agreement. The employer's obligation, in either instance, is predicated upon the need of the union for such information in order to provide intelligent representation of the employees.[7] The test of the union's need for such information is simply a showing of "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."[8] The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiating or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of an employer to provide it.[9] The appropriate standard in determining the potential relevance of information sought in aid of the bargaining agent's responsibility is liberal discovery-type standard.[10]

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[6] *Vertol Division, Boeing Company,* 182 NLRB 421, 74 LRRM 1165 (1970); *N.L.R.B.* v. *Whitin Machine Works,* 217 F.2d 593, 35 LRRM 2215 (C.A. 4, 1954), cert. denied 349 U.S. 905, 35 LRRM 2730 (1955).

[7] *F. W. Woolworth Co.,* 109 NLRB 196, 197, 34 LRRM 1319 (1954), enfd. 352 U.S. 938, 39 LRRM 2151 (1956).

[8] *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432, 437, 64 LRRM 2069 (1967).

[9] *The Brooklyn Union Gas Company,* 220 NLRB 189, 90 LRRM 1479 (1975).

[10] *Acme Industrial Co., supra.*

In *Ohio Power Company,* 216 NLRB 987 (1975, it was stated that:

Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required; but where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting or work performable by employees within the appropriate unit) and relevance is required to be somewhat more precise. See *Curtiss-Wright Corporation* v. *N.L.R.B.,* 347 F.2d 61 (C.A. 3, 1965) . . . .

In *Westinghouse Electric,* the Board ruled that an employer must furnish statistical data on minority and female employees in the unit, along with a list or charges filed against the company. The Board did not require it to furnish such information with respect to nonunit employees, however. The Board pointed out that the information with respect to unit employees was "presumptively relevant," but that the union "must ordinarily demonstrate more precisely the relevance of the date requested" on nonunit employees.

Respondent defends its refusal to turn over the earnings information on all of the employees set forth on the list submitted to it by the Union on the basis that the Union's demand was "prohibitively broad." Respondent notes that the list included "individuals who are admittedly supervisors and . . . individuals who are admittedly not in the bargaining unit" and contends that the Union has not demonstrated relevence for such information. Thus, Respondent argues, no duty to supply the requested information ever arose. Respondent also contends that the instant case is different from other cases involving a refusal to furnish information in that the Company's actions were based on "employees' ideas on privacy and confidentiality."

Having considered the whole record, I am constrained to find Respondent's contentions to be without merit and hold the Respondent violated Section 8 (a)(5) and (1) of the Act as alleged.

First of all, I do not understand the Union to be asking for wage information on any employee who does not perform unit work. The name of Calvin Wilson (and possibly others) was on the list, as pointed out by Chapel Chairman Bates, only by "oversight."

Even though the Union may not have advised Respondent of the reasons for requesting the earnings information until the hearing, Respondent was called upon to furnish it because of its presumed relevance. In its recent *Amphlett Printing Co.* decision, 237 NLRB No. 139 (1978), the Board found that the employer was required to furnish wage information on nonunit personnel even though it did not explain why it was needed until the hearing. The Board rejected the notion that the Union had "failed to adequately inform the Respondent as to the basis of its request for information," stating:

> We conclude that the Administrative Law Judge has, by his emphasis of minor inconsistencies in the Union's position in this case, failed adequately to consider the applicable test for determining whether Respondent was obligated to provide the requested information. This, the appropriate inquiry is simply whether the information was "potentially relevant" to the Union in connection with bargainable issues then being pursued. That information appears unnecesary to an employer is obviously an inadequate ground for refusal, particularly when (as here) the employer possesses clearly useful comparative wage data and the union does not. Here, the Union requested information concerning the compensation paid to nonunit correspondents who furnish

editorial material and perform editorial functions for the same employer – work virtually identical to that performed by the editorial employees within the represented unit. In our view, information about such compensation is indeed potentially relevant. [8]

[8] See our discussion of *Northwest Publications, Inc.*, 211 NLRB 464, 86 LRRM 1345 (1974), in *Times-Herald, Inc.*, 237 NLRB No. 135, 99 LRRM 1224. Compare *Temple-Eastex, Incorporated, et al.*, 228 NLRB 203, 204, 96 LRRM 1424 (1977), where the relevancy requirement was discussed and applied in a context of unit erosion.

The Union is entitled to earnings information on assistant foremen and even foremen as they may, under the contract, perform unit work, which, of course, would result in the loss of unit work for other employees. Such information is essential to the Union in policing of the collective bargaining agreement. See *Globe Stores, Inc.*, 227 NLRB 1251 (1977); *Northwest Publications, Inc.* 211 NLRB 464 (1974); and *Curtiss-Wright Corp.* v. *N.L.R.B., supra.*

Respondent's contention that the earnings information should be kept confidential on the basis of employees' ideas on privacy and confidentiality must be rejected. It is not a new or valid defense. See for example, *Utica Observor-Dispatch* v. *N.L.R.B.*, 229 F.2d 575 (2d Cir., 1956); *The Kroger Co.*, 163 NLRB 441 (1967); *Curtiss-Wright Corp.* v. *N.L.R.B., supra;* and *Westinghouse Electric Corp., supra.* The Supreme Court's recent decision in *Detroit Edison Co.* v. *N.L.R.B.*, 440 U.S. 301 (1979), relied on by Respondent, does not, in my view, compel a different result. True, the Supreme Court in that case stated that a Union's bare assertion of a need for data does not oblige the employer "to supply all information." But the information sought in that case–aptitude test questions, answer sheets and scores–was far more sensitive than the wage information sought here, and Detroit Edison had made an adequate alternative means of granting the

union's request for the information sought. See *Air Express International Corporation,* 245 NLRB No. 69 (1979).

I enter the following conclusions of law:

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Dallas Typographical Union No. 173 is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to supply earnings information on all employees performing production work at Respondent's Dallas, Texas facility involving the markup of copy continuing on through the printing press, excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run, Respondent violated Section 8(a)(5) and (1) of the Act.

The Remedy

Having found Respondent engaged in unfair labor practices I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent supply the Union with earnings information on all employees doing unit work. I shall also recommend that Respondent cease and desist from failing and refusing to supply the Union with other information relevant and necessary to the performance of the obligation of collective bargaining representative. The posting of an appropriate notice will also be recommended.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [16]

[16] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Jaggars-Chiles-Stovall, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to supply the Dallas Typographical Union No. 173 with information relevant and necessary to the performance by such Union of its obligations as bargaining representative of employees of Respondent.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their bargaining rights through the above-named Union.

2. Take the following affirmative action found necessary to effectuate the policies of the Act:

(a) Upon request furnish the above-named Union the following information:

(1) The names and rates of pay of each employee, including those classified as foremen and assistant foremen, who performs production work at Respondent's Dallas, Texas facility involving the markup of copy continuing on through the printing press, excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run.

(2) All other information relevant and reasonably necessary to the performance of the Union's obligation as a bargaining representative.

(b) Post at its Dallas, Texas, facility, copies of the attached notice marked "Appendix." [17] Copies of said

[17] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated: January 30, 1980.

/s/ HAROLD A. KENNEDY

Harold A. Kennedy
Administrative Law Judge

Appendix A 10-(SF)-16-80

FORM NLRB-4707 (5-63)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL, upon request by the Dallas Typographical Union No. 173, provide the names and rates of pay of each employee at our Dallas, Texas, facility, including those classified as foremen and assistant foremen, who perform production work involving the markup of copy continuing on through the printing press, excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run.

WE WILL furnish all other information relevant and reasonably necessary to the performance of the Union obligation as a bargaining representative.

JACOBS-CHILES-STOVALL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Federal Office Building, 819 Taylor Street, Room 8A24,
Fort Worth, TX 76102 Telephone Number (817) 334-2941.

FJP

249 NLRB No. 108

D–6394
Dallas, TX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

JAGGARS-CHILES-STOVALL, INC.
and Case 16–CA–8323
DALLAS TYPOGRAPHICAL UNION NO. 173

DECISON AND ORDER

On January 30, 1980, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Jaggars-Chiles-Stovall, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. May 21, 1980

John H. Fanning,	Chairman
Howard Jenkins, Jr.,	Member
John A. Penello,	Member

NATIONAL LABOR RELATIONS BOARD

249 NLRB No. 108 D–6394

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT fail or refuse to supply Dallas Typographical Union No. 173 with information relevant and necessary to the performance of its obligations as bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, upon request by Dallas Typographical Union No. 173, provide the name and rate of pay of each employee at our Dallas, Texas, facility, including those classified as foremen and assistant foremen, who perform production work involving the markup of copy continuing on through the printing press, excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run.

WE WILL furnish all other information relevant and reasonably necessary to the performance of the Union's obligations as bargaining representative.

JAGGARS-CHILES-STOVALL, INC.

_____
(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817-334-2941.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JAGGARS-CHILES-STOVALL, INC., Respondent.

No. 80-1923
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 19, 1981.

On petition by the National Labor Relations Board for enforcement of an order against an employer, the Court of Appeals, Tate, Circuit Judge, held that: (1) employer could not withhold nonunit employee wage data from union merely because certain nonunion unit employees specifically requested that their wage data remain confidential, and (2) in view of collective bargaining agreement provisions that foremen might perform production work to expedite production schedule but not to reduce overtime or maintain smaller work force than otherwise would be required and that assistant foremen doing journeymen's work should be classified as hourly employees and be subject to all regulations applying to journeymen, wage data on foremen and assistant foremen who performed unit work was relevant information for union's monitoring of employer's performance of its obligations under collective bargaining contract with regard to bargaining unit's work and pay standards, and employer was properly found to have committed unfair labor practice in refusing to furnish relevant wage data requested.

Order enforced.

Application for Enforcement of An Order of the National Labor Relations Board.

Before POLITZ, TATE and SAM D. JOHNSON, Circuit Judges.

TATE, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order against Jaggars-Chiles-Stovall, Inc., a Dallas printing firm. The Board found that J-C-S, the employer, had committed an unfair labor practice in violation of section 8(a)(1) and (5) [1] of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5), in failing to provide the Union with certain requested wage data concerning (1) non-union unit members and (2) supervisory workers performing bargaining unit work. J-C-S refuses to furnish this information because (1) certain non-union unit members requested it remain confidential and (2) there is insubstantial evidence to establish the relevancy to the union of the wage data of the supervisory workers. Because we find the employer's refusal to furnish the requested wage data to be unwarranted, we grant the enforcement of the order of the NLRB.

Context Facts

In 1978, Dallas Typographical Union No. 173 [hereinafter referred to as the Union] and Jaggars-Chiles-Stovall, Inc., [J-C-S] signed a collective bargaining agreement to cover the period of February 21, 1977, to June 30, 1981. (General Counsel Exhibit 2). In this agreement, J-C-S recognized the union as the exclusive bargaining representa-

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[1] Section 8(a)(1) and (5), 29 U.S.C. § 158(a)(1)(5), provide:

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

tive of all employees covered by this agreement, i.e., the Union was to represent the collective bargaining unit.[2]

In February, 1979, the Union representative at J-C-S, "Chapel Chairman" Bates,[3] requested Bob Stovall, president of J-C-S, to furnish monthly earnings figures for the month of January for all unit employees (whether union members or not), as well as for various supervisory employees. The Union sought this data in order to adequately monitor the agreement between the Union and J-C-S: specifically, the Union contended that (1) it needed the earnings data for all unit workers because it was the Union's responsibility to protect the contract's work and pay standards for all unit employees, whether union members or not, and (2) the wage data on certain supervisory personnel was needed because it was alleged that they were performing unit work perhaps in violation of the agreement.

J-C-S refused to furnish this information to the Union, and the Union subsequently filed a charge with the National Labor Relations Board, which filed a complaint alleging J-C-S violated section 8(a)(5) and (1) of the National Labor Relations Act.

A hearing was held before an administrative law judge. The ALJ determined that the information sought by the Union was indeed relevant for the Union to properly monitor the agreement. Furthermore, the ALJ concluded that the wage data was not confidential information, even if the non-Union unit employees had requested it to remain so. As a result, J-C-S was ordered to furnish the wage data

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[2] Article II, Section 1 of the agreement defined the bargaining unit:

Jurisdiction of the Union begins with the mark-up of copy and continues on through the printing press (but excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run.) The appropriate bargaining unit consists of all employees performing such work.

[3] A chapel chairman is the equivalent of a shop steward.

sought by the Union. This recommended order of the ALJ was adopted by the NLRB, 249 NLRB No. 108, which now applies to this court for the enforcement of its order.

J-C-S opposes its enforcement for the following two contended reasons:

(1) Certain non-union unit employees specifically requested that their wage data remain confidential, and

(2) There is insubstantial record evidence to establish the relevance of wage data for supervisory personnel.

We disagree with both of these contentions.

Confidentiality

[1] We first note that J-C-S does not challenge the *relevancy* of the wage data for non-union *unit* employees. *See generally N.L.R.B. v. Brazos Electric Power Cooperative, Inc.*, 615 F.2d 1100 (5th Cir. 1980); *San Diego Newspaper Guild, Etc. v. N.L.R.B.*, 548 F.2d 863 (9th Cir. 1977); *N.L.R.B. v. Rockwell-Standard Corp.*, 410 F.2d 953 (6th Cir. 1969). However, J-C-S contends that, in situations where non-union unit members specifically request that their wage data remain confidential, employers are under no obligation to disclose this information, relevant or not, to the union.

This circuit has already addressed the issue of confidentiality of wage data. In *National Labor Relations Board v. Item Company,* 220 F.2d 956 (5th Cir. 1955), this court held that an employer had no confidentiality privilege[4] to withhold from the Union relevant wage data, "which the union's own employee-members apparently refused to disclose to it." *Id.* at 959.

J-C-S maintains that *Item* is inapplicable to the instant

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[4] Other circuits likewise treat the wage data of unit employees to be non-confidential. See, e.g., *NLRB v. Frontier Homes Corporation,* 371 F.2d 974 (8th Cir. 1967); *Utica Observer-Dispatch, Inc. v. N.L.R.B.*, 229 F.2d 575 (2d Cir. 1956); *Boston Herald-Traveler Corporation v. N.L.R.B.*, 223 F.2d 58 (1st Cir. 1955).

factual circumstances because, there, no employee had asked the employer to withhold any information. We do not find this distinction to be persuasive.

[2, 3] The union representing a collective bargaining unit has the responsibility to represent both union and non-union members of that unit. *Abilene Sheet Metal, Inc. v. N.L.R.B.*, 619 F.2d 332 (5th Cir. 1980); *In re Carter*, 618 F.2d 1093 (5th Cir. 1980.) This duty toward both union and non-union employees of the unit extends not only to the negotiations for an agreement, but also to the enforcement of the provisions of the agreement. *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979). A non-union segment of the bargaining unit, if its claim of confidentiality were recognized, could frustrate the union's attempt to fulfill its obligation to enforce the provisions of a collective bargaining contract intended to benefit both union and non-union employees. As stated in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 912, 17 L.Ed2d 1842 (1967), "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interest of an individual employee to the collective interest of all employees in a bargaining unit."

Respondent J-C-S, in contending that the Union's right to information is not unlimited, cites *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979). There, the court held that an employer could refuse to provide a union the results (linked with names) of aptitude tests taken by unit employees.[5] *Detroit Edison Co.* is, however, inapposite to the case before us. Wage data concerning each employee, here involved, is not akin to the sensitive individualized test-result information, as to which a defense of confidentiality was recognized in *Detroit Edision Co.;* nor did that decision cast doubt upon the previously-cited consistent jurisprudence rejecting any claim of

5. "The sensitivity of any human being to disclosures of information that may be taken to bear on his or her basic competence is sufficiently well known . . ." *Detroit Edison Co., supra*, 99 S.Ct. at 1133.

confidentiality, where relevant wage data was sought by the bargaining unit's representative.

Supervisory Workers

[4] J-C-S correctly argues that wage data on employees outside the bargaining unit must meet a standard of relevance. *Rockwell-Standard Corp., supra,* 410 F.2d at 957. However, as this court has already noted, "[t]he Board's determination of the relevance of the information sought in a particular case must be given great weight by the courts, if only because it is a finding of law and fact" within the expertise of the NLRB. *NLRB v. Brazos Elec. Power Co-op., Inc.,* 615 F.2d 1100, 1101 (5th Cir. 1980).

[5] The Union sought the wage data on certain foremen and assistant foremen who occasionally performed unit work. The Union needed this information primarily to ensure that article II, section 6 of the agreement was not violated. This section read in pertinent part:

> Foremen may perform production work to expedite the production schedule, but will not perform such work to reduce overtime or to maintain a smaller work force than otherwise would be required. Assistant foremen doing journeymen's work shall be classified as hourly employees and shall be subject to all regulations applying to journeymen.

The Union argues that the earnings data for assistant foremen is necessary to verify the employer's records concerning the amount of overtime unit work performed by them.[6] Furthermore, although Chapel Chairman Bates ad-

[6] Bates testified:

> Assistant foremen are paid a percentage above journeymen wages. If he works overtime he's paid overtime on the basis of his pay, not journeyman scale, therefore, he would draw overtime on a—time and a half of his regular hourly wages. To know that he was being paid properly it would be necessary to know the amount. To know that the overtime was being distributed equitably we would need to know the number of hours. To compile as to whether the overtime pay and hours did correspond we would need to know them both.

Trial p. 69.

mitted on cross-examination (Trial p. 64–68) that the amount of overtime hours worked by a foreman would be sufficient (because the foreman worked on a straight salary and received no overtime compensation), the earnings data is relevant as permitting verification that foremen were not being paid for additional hours for performing unit work, perhaps in violation of the agreement between the Union and J-C-S.

Thus, the ALJ and the NLRB properly held that the requested wage data on the foremen and assistant foreman who performed unit work is relevant information for the union's monitoring of the employer's performance of its obligations under the collective bargain contract with regard to the bargaining unit's work and pay standards. In addition to cases previously cited, see also: *Curtiss-Wright Corp., Wright Aero. Div. v. N.L.R.B.*, 347 F.2d 61, 64 (3rd Cir. 1965); *Hollywood Brands, Inc. and United Bakery & Confectionery Workers Local 441-B, 142 N.L.R.B. 304, enforced, Hollywood Brands v. N.L.R.B.*, 324 F.2d 956 (5th Cir. 1963), *rehearing denied*, 326 F.2d 400, *cert. denied*, 377 U.S. 923, 84 S.Ct. 1221, 12 L.Ed.2d 215 (1964).

Conclusion

Under these circumstances, J-C-S was properly found to have committed an unfair labor practice in refusing to furnish the Union with relevant wage data it requested. The Board order will be ENFORCED.

ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* versus JAGGARS-CHILES-STOVALL, INC., *Respondent.*	((((((	No. 80-1923 NLRB 16 CA 8323

JUDGMENT

Before: POLITZ, TATE AND SAM D. JOHNSON, Circuit Judges.

On March 19, 1981, being fully advised in the premises, the Court handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Jaggars-Chiles-Stovall, Inc., its officers, agents, successors, and assigns, abide by and perform the directions in said order contained.

Costs are to be taxed against respondent.

FILED: March 19, 1981

ISSUED AS MANDATE:

Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1967

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAGGARS-CHILES-STOVALL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

LAWRENCE G. WALLACE
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DAVID S. FISHBACK
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National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to comply with the bargaining agent's request for information about earnings of persons performing bargaining unit work.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1967

JAGGARS-CHILES-STOVALL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-25 to A-31) is reported at 639 F.2d 1344. The decision and order of the National Labor Relations Board (Pet. App. A-4 to A-24) are reported at 249 N.L.R.B. 697.

JURISDICTION

The judgment of the court of appeals was issued on March 19, 1981 (Pet. App. A-32). The petition for a writ of certiorari was filed on May 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are set forth at Pet. 2.

STATEMENT

1. Petitioner, a printing firm, has a collective bargaining relationship with the Union [1] covering a unit of its journeymen and apprentices (Pet. App. A-5). The collective bargaining agreement between petitioner and the Union for the period February 21, 1977-June 30, 1981, provides that (1) overtime work shall be compensated at the rate of time-and-a-half for the first four hours, and double time thereafter (G.C. Exh. 2, Art. IV, Sec. 4); [2] (2) "[o]vertime shall be distributed in a fair and equitable manner" (G.C. Exh. 2, Art. VI, Sec. 12); and (3) while foremen may "perform production work to expedite production, [they may] not perform such work to reduce overtime" available to unit members (G.C. Exh. 2, Art. II, Sec. 6; Pet. App. A-6 to A-8). In February 1979, the Union—concerned that these provisions may have been violated—requested petitioner to produce earnings information, including hours worked and gross earnings, for all workers performing unit work, including supervisors (Pet. App. A-7 to A-8). Petitioner refused to provide any earnings information about workers who were not members of the Union. Petitioner contended that promises of confidentiality made to nonunion unit employees and the supervisory status of the foremen and assistant fore-

[1] Dallas Typographical Union No. 173.

[2] "G.C. Exh." refers to the General Counsel's exhibits in the unfair labor practice proceeding.

men who had performed unit work privileged its refusal to supply the requested information (Pet. App. A-10, A-16).

2. Adopting the decision of the administrative law judge, the Board found that petitioner's refusal to furnish the requested information violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. A-15, A-21). The Board rejected petitioner's contention that the information sought was not relevant, finding that the Union needed it to assure conformance with the overtime provisions of the contract (Pet. App. A-7 to A-8, A-15 to A-16). Union spokesman Bates testified that (Pet. App. A-7 to A-8; footnote omitted):

> he decided to press for the nonunion wage information in early 1979 because he knew there were employees who worked on Saturdays and Sundays. Bates said he did not know if they were paid overtime or if at all [*sic*]. He said he was concerned about payment of overtime and that overtime work should be "given out in a fair and equitable manner" in accord with the contract. Bates also stated that he had become concerned about the possibility that an assistant foreman, who could do journeyman work on an hourly basis subject to regulations applicable to journeymen * * *, might be working "in excess."

The Board also rejected petitioner's contention that the nonunion unit employees' earnings information should be kept confidential because, some years earlier, some of those employees had requested that petitioner not give the information to the Union (Pet. App. A-10, A-16). The Board distinguished this

Court's decision in *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), on the ground that "the information sought in that case—aptitude test questions, answer sheets and scores—was far more sensitive than the wage information sought here, and Detroit Edison had [provided] an adequate alternative means of granting the union's request for the information sought" (Pet. App. A-16 to A-17). The Board ordered petitioner, *inter alia*, to "supply the Union with earnings information on all employees doing unit work" (Pet. App. A-17).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-25 to A-31).

The court noted that petitioner no longer challenged the relevancy of the requested wage data as to nonunion unit employees, but contended that it was entitled to honor those employees' confidentiality request, even if the information sought was relevant (Pet. App. A-28). In rejecting petitioner's assertion, the court reaffirmed the established principle that an employer is not privileged to withhold relevant wage data from a union because the employees do not want the union to have that information (*ibid.*). The court considered *Detroit Edison*, *supra*, to be "inapposite," explaining that "[w]age data concerning each employee, here involved, is not akin to the sensitive individualized test-result information, as to which a defense of confidentiality was recognized in *Detroit Edison Co.* * * *" (Pet. App. A-29).

The court also agreed with the Board that the Union had established the relevance of the wage rates of the foremen and assistant foremen who performed unit work (Pet. App. A-31). The court noted that the collective agreement precluded such work from being performed by supervisory personnel if the work

opportunities of unit employees would be limited and agreed that the requested data were needed to police that provision of the contract (Pet. App. A-30 to A-31).

ARGUMENT

Nothing in the record supports petitioner's apparent assertion (see Pet. i, 3, 6) that the information sought by the Union was not needed to police the collective bargaining agreement. Information as to the number of hours foremen spent performing unit work might have been sufficient to determine whether their work reduced the overtime that otherwise would have been performed by unit employees (see Pet. App. A-8 & nn.10-11; see also Pet. 3, 6).[3] Nevertheless, information limited to the number of hours worked by unit employees and assistant foremen obviously would not indicate whether these individuals were being paid in accordance with the contract.[4] Only the individual earnings data that petitioner refused to disclose could show whether the employees had, in fact, been paid at the rate prescribed in the contract (see G.C. Exh. 2, Art. V, Sec. 1); that information was not reasonably available from any other source.[5]

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[3] Also, information as to the number of overtime hours worked by individual unit employees might have been useful in analyzing the fairness and equity of overtime "distribution."

[4] Although foremen are paid a salary, assistant foremen and unit employees are paid at an hourly rate specified by contract. Contrary to petitioner's suggestion (Pet. 3, 6), at no time did any Union representative indicate that gross earnings information with respect to assistant foremen and all unit employees was unnecessary (Pet. App. A-8).

[5] In addition, information as to actual earnings of individuals would provide confirmation of the amount of overtime

Petitioner refused to provide individual earnings information as to nonunion unit members on the ground that some of those individuals had asked at some point that the information not be disclosed to the Union.[6] Relying primarily on this Court's decision in *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), petitioner argues (Pet. 6-7) that the court of appeals erred in rejecting this contention. In *Detroit Edison*, this Court held that "[i]n light of the sensitive nature of [the] testing information" sought by the Union, "the minimal burden" that the Union would have suffered by accepting the employer's alternative suggestion for compliance with the request for information, "and the total absence of evidence that the [employer] had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities," the employer had not violated "the statutory obligation to bargain in good faith" by refusing to disclose individual test results without the consent of the individual concerned. 440 U.S. at 319-320. *Detroit Edison* provides no support for petitioner's refusal to comply with the Union's request here.

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actually worked and, therefore, was relevant to enforcement of the contract provisions concerning the performance of unit work by foremen and assistant foremen and the distribution of overtime (see Pet. App. A-8).

[6] As to its foremen and assistant foremen, however, petitioner refused to provide the requested information on the grounds that such information was irrelevant to the needs of the Union and that foremen and assistant foremen were not "employees." The court of appeals correctly rejected the claim (Pet. App. A-30 to A-31), and petitioner does not challenge that holding in this Court.

First, in *Detroit Edison* the Court did not purport to establish any general "confidentiality" exception to an employer's obligation to disclose relevant information to a Union. Throughout the opinion for the Court in *Detroit Edison* the "sensitive" nature of individual test scores was emphasized. See 440 U.S. at 306-307 & n.6, 315, 316-317, 318-319 n.16. As the court of appeals correctly concluded (Pet. App. A-29), particularly where, as here, wage rates are set by contract, gross earnings information "is not akin to the sensitive individualized test-result information" at issue in *Detroit Edison*. Second, petitioner made no offer to provide the requested information in any form sufficient to satisfy the Union's needs. Third, petitioner's purported concern about the confidentiality of the individual earnings of employees is somewhat contradicted by its assertion (Pet. 4) that it "was not unwilling to provide [information as to] * * * the amount of overtime worked by each employee * * *"—which is tantamount to disclosing what the employee should have been paid under the contract.

Nor is the holding of the court of appeals in this case inconsistent with the decision of any other court of appeals. The courts have consistently rejected the contention that the asserted confidentiality of wage data justifies an employer's refusal to disclose that information to a union. See, *e.g.*, *General Electric Co.* v. *NLRB*, 466 F.2d 1177, 1185 (6th Cir. 1972); *NLRB* v. *Frontier Homes Corp.*, 371 F.2d 974, 978-979 (8th Cir. 1967); *Curtiss-Wright Corp.* v. *NLRB*, 347 F.2d 61, 71 (3d Cir. 1965); *Utica Observer-Dispatch, Inc.* v. *NLRB*, 229 F.2d 575, 576 (2d Cir. 1956); *NLRB* v. *Item Co.*, 220 F.2d 956, 959 (5th Cir. 1955); *Aluminum Ore Co.* v. *NLRB*, 131 F.2d

485, 487 (7th Cir. 1942); see generally *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58 (1st Cir. 1955).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] *Emeryville Research Center* v. *NLRB*, 441 F.2d 880 (9th Cir. 1971), is not to the contrary. There the court simply held that when an employer raised specific objections to the form in which the information was requested and offered to provide the information in mutually satisfactory form, but the union failed to cooperate in the effort to determine a mutually satisfactory form, there was no violation of federal labor law. As noted above, however, petitioner simply refused to provide the information and made no attempt to seek a mutually acceptable manner of proceeding.

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